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IN THE

Supreme Court of the United States

October Term, 1968

No. 1088

THE OFFSHORE COMPANY, *Petitioner*

-against-

G & H OFFSHORE TOWING COMPANY, INC., *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Introduction	1
Statement	2
Argument	5
Under the captioned "Reasons for Granting the Writ" (page 11), Petitioner sets out nothing within the scope of Rule 19 for review by this Court.	
Counterpoint I	5
The decision of the Court of Appeals for the Fifth Circuit is not in conflict with decisions of this Court or other Courts of Appeal.	
Counterpoints II and III	8
The decision of the Court of Appeals for the Fifth Circuit is not in conflict with the decisions of other Courts of Appeal on the question of inferences to be drawn in connection with damages to a tow or on the question of application of the doctrine of res ipsa loquitur in admiralty in this factual context.	
Counterpoint IV	11
The decision sought to be reviewed is one which rests solely on factual determination and is not one of general importance or of substantial concern to the shipping public.	
Conclusion	12

LIST OF AUTHORITIES

CASES	Page
American Bridge Division, United Steel Corporation v. Roen Steamship Company, 328 F.2d 838 (2d Cir., 1964)	9
Appeal of Cahill, 124 F. 63 (2d Cir., 1903)	10
Bisso v. Waterways Transportation Co., 235 F.2d 741 (5th Cir., 1956)	10
Chemical Transporter, Inc. v. M. Turecamo, Inc., 290 F.2d 496 (2d Cir., 1961)	9
Coleman v. Aiken, 242 F. 239 (5th Cir., 1917)	10
Detyens v. Marine Industries, Inc., 349 F.2d 357 (4th Cir., 1965)	8
Sternberg Dredging Co. v. Moran T. and T. Co., 196 F.2d 1002 (2d Cir., 1952)	8, 11
The Anaconda, 164 F.2d 224 (4th Cir., 1947)	8, 10
The Joseph F. Clinton, 250 F. 977 (2d Cir., 1918)	10
FEDERAL RULES OF CIVIL PROCEDURE	
Rule 52 (a)	10
PETITIONER'S CASES DISTINGUISHED	
Nassau Sand and Gravel Co., Inc. v. Red Star Towing and Transportation Co., Inc., 62 F.2d 356 (2d Cir., 1932)	7
Navigazione Libera T.S.A. v. Newtown Creek T. Co., 98 F.2d 694 (2d Cir., 1938)	7
Story Parchment Company v. Paterson Parchment Paper Company, 282 U.S. 555, 75 L.Ed 544 (1931)	7
The Mason, 249 F. 719 (2d Cir., 1918)	6, 7

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INTRODUCTION

Respondent, G & H Offshore Towing Co. (hereinafter G & H), would show the Court that The Offshore Company's Petition for Writ of Certiorari presents nothing for review within the scope of Rule 19. It merely seeks a review of issues of fact which have been decided adversely to Petitioner by the District Court, the Special Commissioner appointed by the Court, the District Court again in its opinion confirming the report of the Special Commissioner and in a per curiam opinion by the United States Court of Appeals for the Fifth Circuit. There is

no real issue of law in the case and there is no conflict between the decision of the Court of Appeals here and the opinion of any other Court of Appeals. No question of general importance is involved. Although only a redetermination of facts is sought, at no place in the Offshore Company's Petition is there any reference to, or discussion of, the clearly erroneous rule.

STATEMENT

Under a towing contract G & H agreed to tow the Drill Barge 58 from Beacon No. 7 off Morgan City, Louisiana to Brighton, Trinidad. Under Paragraph 4 of that towing contract it was the obligation of The Offshore Company to properly fit out and maintain the tow for the towage and to comply with its surveyor's recommendations and The Offshore Company agreed to indemnify G & H and to hold it harmless from all loss, damage or liability arising out of or in any way contributed to by the unseaworthiness of the Barge 58.

The Barge 58 was substantially a rectangular steel box, approximately 100 feet long, 80 feet wide and 12 feet in depth.

The Offshore Company employed Surveyor Blakely to inspect the barge prior to the commencement of the towage operation, and there was no duty on G & H in respect of the seaworthiness of the barge. Thus, the statement found on Page 3 of The Offshore Company's Petition reading:

> "The JUNO's Captain, her officers and crew, without exception, all testified that at the time of delivery the barge was in good condition, thus making the testimony unanimous and establishing beyond doubt

> that the barge was in fact sound, seaworthy and entirely suitable for the proposed towage, and the district court so found. (353)."

has no validity.

None of the tug personnel boarded and inspected the Barge 58 prior to the commencement of the towage operation. All of their testimony was based on casual observation of the barge from the tug. None of them knew of the hole Blakely had overlooked in the after end of the generator room.

Apparently there is no dispute between the parties that the damage done to the generator house was the result of water entering through the drain hole in the after end of the generator house. See Offshore's Petition, Page 8.

After a full hearing, the Trial Court made findings of fact and conclusions of law which were incorporated in the Court's memorandum filed June 10, 1966. Among other things, the Court, speaking of damages found on the forward end of the barge, stated: (262 F. Supp. 282, at 285)

> "The damage had obviously been inflicted by some heavy object or objects which had come in violent contact with the hull during the towage."

The Court further specifically found that there was no negligence on the part of the tug in causing the original holing of the forward end of the barge. Parenthetically, this original holing caused only a very minor amount of damage. (Petition, p. 8)

The Trial Court did think there was some negligence on the part of the tug in not sconer proceeding to Key West and in the Interlocutory Decree decreed that The

Offshore Company was entitled to recover the damages, if any, resulting from the delay after noon on January 17 in getting the barge to Key West. That matter was then referred to Ed Bluestein, Esq., as Special Commissioner. After voluminous testimony was taken before the Commissioner, he found that no damages were occasioned to the barge by what the Court had said was a negligent delay, but found that all of the damages so complained about were due to the unseaworthy condition of the barge in that the hole in the after end of the generator house permitted the entry of the water that caused the damage. Oddly, The Offshore Company has not brought the testimony adduced before the Commissioner before this Court for review.

The Commissioner's Report and the evidence on which he acted was submitted to the Trial Court, who, by supplemental memorandum dated May 16th, 1967, among other things, stated: (R. 302)

> "The principal question is that of the cost of the repairs. As is evident from an examination of the Memorandum Opinion of this Court of June 10th, 1966, I was then of the view that the evidence on damages likely would show that the continued exposure of the barge to the saltwater which had intruded both in her forward compartments and in her deckhouse had increased the damage, and occasioned additional repairs, which would not have been necessary had prompt action been taken for her relief. It appears, however, that there is substantial evidence which the Special Commissioner has credited that such was not the case; and that large quantities of saltwater entered the deckhouse when the barge first began going down by the head. The findings that

> the damage was not increased by the delay of the JUNO in heading for a port of refuge find ample support in the evidence."

And further:

> "The report of the Special Commissioner is confirmed. He has carefully analyzed and considered the issue presented, and the evidence."

ARGUMENT

Under the captioned "Reasons for Granting the Writ" (page 11), Petitioner sets out nothing within the scope of Rule 19 for review by this Court.

COUNTERPOINT I.

The decision of the Court of Appeals for the Fifth Circuit is not in conflict with decisions of this Court or other Courts of Appeal.

It must be pointed out that, contrary to what Petitioner says, the Courts below did not hold that a tort feasor can avoid payment of damages for the reason that damages cannot be measured with exactness and precision. Instead, the Special Commissioner specifically held:

> "If there were credible testimony in the record that the delay in all probability substantially increased the damages, a recovery by Offshore would not be withheld because no exact or precise computation could be made of the increased amount. It would suffice that some reasonably reliable basis was shown upon which an apportionment could be made. Moreover, recovery should not be withhheld under circumstances where the damages caused by a negligent

party cannot be separated or apportioned, for to do so would penalize the innocent party to the relief of the guilty one.

This record, however, lacks evidence to establish (1) that the negligence of G & H caused additional damages, . . . Offshore's burden initially was to establish (1) above. It did not do so." (Report of Special Commissioner, Page 14).

The above excerpt shows beyond doubt that the Courts below did not deny recovery for the reasons stated by Petitioner and show that the cases cited in Reason 1 have no application here. Found facts based upon evidence, were that Respondent did not negligently cause *any* damage to Petitioner's barge. The District Court held

(262 F. Supp. 282, 287) that the original cause of the holing was that of floating objects, a peril of the sea over which neither party had control. The Commissioner then held, and was affirmed in so holding by the District Court (287 F. Supp. 724), that no damages were attributable to the negligence of Respondent for not deviating once the barge was ascertained to be in some trouble. Petitioner's "conflicting cases" deal with apportioning damages once demages are determined. In the case at hand, however, there were no damages attributable to the Respondent's negligence and so there was no apportionment necessary.

Petitioner cites several cases with which it claims the Fifth Circuit opinion conflicts, but, on careful reading, it is found that this is certainly not the case. *The Mason,* 249 F. 719 (2d Cir., 1918), noted in Offshore's Petition at page 12, is representative of the cases Petitioner cites. In that case, on two separate occasions a steamboat had suffered a stranding. The Claimants of the tug involved

had admitted that they had caused some damage. In *The Mason,* "The single issue . . . was whether the damage to a particular part of the ANDREWS' bottom was caused by the stranding of March, 1909." 249 F. 719, 720. There was no question of whether there had actually been damage as there was in the case at hand. Petitioner's other cases are likewise distinguishable:

1. *Navigazone Libera T. S. A. v. Newtown Creek T. Co.,* 98 F.2d 694 (2d Cir., 1938). Here again there was no question of initially finding damages. The problem was one of segregating damages to the propeller of the ship from those to the propeller bushing and adjacent parts.

2. *Nassau Sand and Gravel Co., Inc. v. Red Star Towing and Transportation Co., Inc.,* 62 F.2d 356 (2d Cir., 1932) states, in recognizing that there must first be a finding of negligence, "When the wrong is once proved *and the damages resulting from it*", then the burden is on the tort feasor to apportion (62 F. 2d at 357, emphasis added).

3. *Story Parchment Company v. Paterson Parchment Paper Company,* 282 U.S. 555, 75 L.Ed. 544 (1931). In this case under the Sherman Anti-Trust Act, a jury found there were actual damages, again unlike the case at hand. In fact this Court specifically recognizes that the damages must be attributable to the wrong before the Petitioner's arguments are effective when it states: "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in

> respect of their amount". (Citation omitted 282 U.S. 555, 562). Therefore, first it must be shown that damages definitely result from the wrong.

Thus, it can be seen that when the Special Commissioner found that "No testimony or proof was offered . . . upon which (a finding of damage) could reasonably be based" (Special Commissioner's Report page 14, parenthetical expression added), then this effectively distinguishes all of the cases which Petitioner cites, as well as refutes Petitioner's claim in the first paragraph of his first argument that damage actually resulted from the JUNO's action or inaction. What Petitioner and the cases he cites are speaking of was not even at issue in this case since there was no finding that Respondent's negligence caused any damages. Therefore, there was no need to apportion the damages in anyway whatsoever and Petitioner's cases are clearly inapposite.

COUNTERPOINTS II AND III.

The decision of the Court of Appeals for the Fifth Circuit is not in conflict with the decisions of other Courts of Appeal on the question of inferences to be drawn in connection with damages to a tow or on the question of application of the doctrine of *res ipsa loquitur* in admiralty in this factual context.

As the District Court pointed out in its first opinion in the instant case, *Sternberg Dredging Co. v. Moran T. and T. Co.*, 196 F.2d 1002 (2d Cir., 1952), *Detyens v. Marine Industries, Inc.*, 349 F.2d 357 (4th Cir., 1965) and *The Anaconda*, 164 F.2d 224 (4th Cir., 1947), cases with which Petitioner alleges this case conflicts, are cases in which the question was whether "The incident causing

the damage was of such nature that it would not normally have happened had the tug exercised due care". The Court continues, "In my judgment that is not the case (in Offshore v. G & H)". (262 F. Supp. 282, 287). The District Court held that the original damage occurred from floating objects on the night of June 16-17. When the Special Commissioner later determined that no damage resulted from delay, his finding meant that the holing of the barge by floating objects was the cause of all the damage.

In *American Bridge Division, United States Steel Corporation v. Roen Steamship Company*, 328 F.2d 838 (2d Cir., 1964), as well as in the *Sternberg* opinion, the Court did not hold that there was any burden of proof upon the tug until the tow had made out a *prima facie* case of negligence against the tug. The District Court opinion, affirmed on appeal, states:

> "Once the fault of the tug is established, however, the burden is upon the 'tug' to show that none of the courses of action . . . would have succeeded in keeping the barge from capsizing". 216 F.2d 353, 361.

The Court of Appeals' decision in *Roen* indicates that there was insufficient evidence introduced by the tug to hold that the tug was not guilty of negligence, while in the instant case there is evidence sufficient to explain the damage to the Offshore 58 in ways other than the tug's negligence.

Another case cited by Petitioner, *Chemical Transporter, Inc. v. M. Turecamo, Inc.*, 290 F.2d 496 (2d Cir. 1961), is distinguishable as the excerpt from it cited by Petitioner clearly demonstrates. There the fault of the first vessel, a barge with a hole in it, appeared early enough for the

second vessel, a tug, to avoid the damage. To the contrary, in the case at hand, the Special Commissioner found that the damage was already done before the JUNO was negligent and that no further damage was caused by the JUNO's negligence.

The finding by the Court that the floating objects probably caused such damage as was done to the barge is not "clearly erroneous" under Fed. Rule Civ. Proc. 52 (a). This finding established the cause of the damage, hence the doctrine of *res ipsa loquitur* is not applicable. The occurrence was explained and there was no need to have the tug explain further, especially when, due to the circumstances, it was in no better position to do so than the barge itself.

Once again, the cases on inferences to be drawn and on *res ipsa loquitur* cited by Petitioner are distinguishable from the case at hand. *The Anaconda* was distinguished by the District Court as pointed out above, while in *Appeal of Cahill*, 124 F. 63 (2d Cir., 1903), *Coleman v. Aiken*, 242 F. 239 (5th Cir., 1917) and *The Joseph F. Clinton*, 250 F. 977 (2d Cir., 1918), tugs abandoned tows and the burden was placed on the tugs to show efforts to recover the tows. In those cases, the abandonments were held to be negligent, while in the case at hand, the acts of the Respondent prior to noon January 17, 1964, had nothing to do with the damage and the delay after noon caused no damage. The ever present fact of this matter is that even if all the inferences as to negligence made Respondent negligent, still no damages resulted from that supposed negligence.

Petitioner's reliance on *Bisso v. Waterways Transportation Co.*, 235 F.2d 741 (5th Cir., 1956) is also misplaced.

As the portion of the case cited by Petitioner shows, the rule that the tug must explain the accident applies only when a casualty "occurs under circumstances which ordinarily results (sic) in no such casualty". (Offshore's Petition, page 18). This clearly was not the case here as the District Court stated in distinguishing the *Sternberg* opinion among others (262 F. Supp. at 287) and as was set forth above.

COUNTERPOINT IV.

The decision sought to be reviewed is one which rests solely on factual determination and is not one of general importance or of substantial concern to the shipping public.

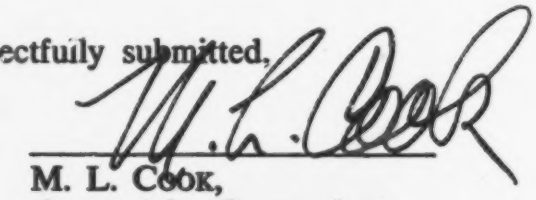
The issue here was simply one of damages inflicted in the particular factual context. The two Courts as well as the Special Commissioner below were correct in their analysis and resolution of the issue of liability and damages. At no point in its petition does Petitioner assert that the findings by the Court or Special Commissioner were "clearly erroneous". This case turns solely upon its own facts and therefore is not one this Court should review.

The Trial Court thought the Tug JUNO was negligent only in delaying after noon on January 17th, 1964. Referral to a Special Commissioner for ascertainment of damages resulted in the finding that no damages resulted from the tug's negligence. Thus, since no attack has been made on the Special Commissioner's findings there is nothing of importance for this Court to consider.

CONCLUSION

The decision below is correct, involves no question of general importance, and there is no conflict between the Courts of Appeal or any other reason why this Court should review the case. Therefore, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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